STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2006
v	No. 263509 Wayne Circuit Court
CHRISTOPHER LEE BLANCHAR REED, Defendant-Appellant.	LC No. 04-003329-02

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of two counts of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), possession of burglar's tools, MCL 750.116, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, resisting and obstructing a police officer, MCL 750.81d(1), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to 14 to 25 years in prison for each of his armed robbery convictions, 6 to 20 years in prison for his first-degree home invasion conviction, five to ten years in prison for his possession of burglar's tools conviction, 40 to 60 months in prison for his felon in possession of a firearm conviction, 40 to 60 months in prison for his carrying a concealed weapon conviction, one to two years in prison for his resisting and obstructing a police officer conviction, and two years in prison for his felony-firearm conviction. He appeals as of right. We affirm, but remand to the trial court to correct the presentence investigation report (PSIR).

Defendant first argues that there was insufficient evidence presented to support his felon in possession of a firearm conviction. Specifically, defendant contends that the prosecutor failed to present any evidence that he was convicted of a specified felony. We disagree. We review sufficiency of the evidence claims de novo, viewing the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001); *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

At trial, the parties submitted a stipulation that conceded that defendant had been convicted of a felony and "had no right to be in possession of a firearm." Therefore, even though the parties did not specifically state that defendant had been previously convicted of a "specified" felony, based on the language of the stipulation that defendant "had no right to be in

possession of a firearm," it is presumed that defendant was convicted of a "specified" felony. Thus, if the evidence presented established that defendant "possessed" a firearm, a rational trier of fact could find beyond a reasonable doubt that the elements of felon in possession of a firearm were met. MCL 750.224f; *People v Tice*, 220 Mich App 47, 50; 558 NW2d 245 (1996).

Here, two men, one dressed in all black and the other wearing a red jacket broke into the victims' house armed with guns. The two men forced one victim to open up his safe and threw all of the money they stole into a flowery pillowcase before leaving the residence around 4:00 a.m. Police officers who were responding to an unrelated call about a block and a half away from the victims' house saw two men in the middle of the street, one in all black and the other wearing a red hooded sweatshirt. When one officer asked the men what they were doing, the man with the red sweatshirt, identified later as defendant, dropped what later turned out to be a gun, and took off running. Finally, when the officer caught up to defendant, he saw defendant throw a flowery pillow case that contained pry bars, a large sum of money and a 1972 immigration receipt with the victims' address. From this, a rational trier of fact could infer that defendant had actual possession of a firearm. Thus, the evidence presented at trial was sufficient to support defendant's felon in possession of a firearm conviction. *Johnson*, *supra* at 723.

Defendant next argues that he was denied his constitutional right to a fair trial through misconduct of the prosecutor. We disagree. Defendant failed to properly preserve this argument by objecting to the alleged prosecutorial impropriety before the trial court. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). We review unpreserved claims of prosecutorial misconduct for a plain error which affected the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *Watson*, *supra* at 592. A prosecutor's personal attack upon the defendant's trial counsel can infringe upon the presumption of innocence and thus be improper. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Id.* at 608.

At trial, defendant testified that he did not participate in the robbery. Instead, he testified that he received a call from one of the perpetrators of the robbery. Defendant stated that he then left his friend's home and met up with the perpetrator near a park near. At that point, defendant said the perpetrator handed defendant a pillowcase with money in it.

During closing arguments, defendant's trial counsel stated,

> What I thought was interesting was [one of the victims] corroborated to a certain extent the testimony from my client, and the witnesses that we called on behalf of the defense.

> She said that [one of the perpetrators] got on his phone, while all four people were down in the basement, got on his phone and called somebody on that phone. She said that the guy in the red jacket was right there when he was making that call, and he's talking to someone.
>
> Now, you've heard testimony that my client talked to [the perpetrator] when he was over at Dustin[']s house, and as a result went to talk to him. I submit to you, ladies and gentlemen, that that was the phone call that was taking place.

In response to this argument, the prosecutor made the following remarks:

> What else do we have in this case. The [victim's], when [the victim] testified, she said that there was one point when an extremely brief phone call, seconds, was made.
>
> Now, again, Defense Attorney got up and testified to a lot of stuff that, well, it was the first time I heard it, because I didn't hear any witness testify to certain things.
>
> If you cannot point to a witness on a witness stand, who says a, b and c, that is not evidence in the case. That is not anything that you can consider when you reach your verdict.
>
> And the judge will tell you, the only thing you can base your verdict on is the evidence, the sworn testimony that comes from the witness stand. Not some testimony by some attorney saying, "This is what the telephone calls [sic] does."

Defendant contends that these remarks improperly denigrated his trial counsel. We conclude that the prosecutor's rebuttal comments were proper comments and did not attack defense counsel or suggest that defense counsel was intentionally attempting to mislead the jury. The prosecutor's rebuttal comments were in response to defense counsel's closing argument wherein he suggested that defendant only went to the area of the crime after one of the perpetrator's called him and told him to come to the park to collect the $5,000 that he purportedly owed defendant. No testimony had been presented regarding what the perpetrator said to defendant when he allegedly called him. Viewing the prosecutor's rebuttal comments in this context, we conclude that the comments were a fair commentary on the argument presented by defendant's trial counsel and the evidence. *Thomas, supra* at 454.

Defendant also contends that the prosecutor denigrated his trial counsel when he made the following argument in response to defendant's trial counsel's statement to the jury that defendant had the right to run from an illegal arrest.

> Counsel makes the argument, "Well, you know, my guy had the right to resist an illegal arrest.["] Fine. That means he knew that it was police officers who was going to arrest him the minute he ran.

> That's an inconsistency. Which one is it? I had no clue as to who it was. I kept running and running and running, until they finally caught up with me, and then I figured out it's the police. And then I, I didn't resist. I did what they said.
>
> Well, Counsel can't have it both ways. That's talking out of both sizes [sic] of your mouth. He now wants you to believe, "Well, you know, he had the right to resist the police. He didn't do anything wrong." Except he didn't do that.
>
> He didn't sit there and turn around and say, "Who are you?" Again, which any normal person would do. "What do you want?" That takes how long? "What are you doing here?" "What do you want?" Two seconds? Three seconds, at the most?
>
> He hears somebody speak and he books from the area. What is that consistent with? That's why I say you got to look at all the evidence in this case.

The prosecutor's rebuttal comments were in response to defense counsel's argument that defendant had no idea that he was running from the police because the man chasing him never identified himself as a police officer and that, in the alternative, defendant had the right to run from the police because he did not do anything wrong and had a right to resist an unlawful arrest. These comments did not unfairly prejudice defendant. The prosecutor merely highlighted the fact that defense counsel's argument was inconsistent and improbable. Therefore, there was no prosecutorial misconduct warranting reversal.

Defendant next argues that the trial court's reasonable doubt and aiding and abetting instructions constituted error warranting reversal. Because defendant's trial counsel expressed satisfaction with the instructions as given, we conclude that defendant has waived any claim of error with regard to the instructions. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant next argues that the case should be remanded so that his PSIR can be changed to reflect that he was convicted by a jury as opposed to being convicted by plea. We agree. Defendant noted this error before the trial court, but it was not corrected. Defendant is entitled to have the incorrect information changed to reflect that he was convicted by a jury. MCL 771.14(6); *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993).

Defendant's final argument on appeal is that he was denied his constitutional right to the effective assistance of counsel. We disagree. Because no evidentiary hearing on defendant's claim of ineffective assistance of counsel was held, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). As a matter of constitutional law, we review the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must

overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id*. at 302.

We reject defendant's argument that he was denied his constitutional right to the effective assistance of counsel when defense counsel failed to object to the prosecutor's rebuttal remarks. As we have already noted, the prosecutor's rebuttal remarks were not improper, accordingly, any objection to them would have been futile. Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

We likewise reject defendant's argument that he was denied his right to the effective assistance of counsel when defense counsel failed to object to the trial court's "beyond a reasonable doubt" instruction. The trial court instructed the jury that,

> Reasonable doubt means exactly what the words signify, a doubt for which you can assign a reason for having.
>
> In other words, what you're asked to do is to bring your everyday knowledge, your everyday common sense, and your everyday experience with you. And you use that when you are determining the results of this matter.
>
> A reasonable doubt is a doubt for which you can assign a reason for having. A doubt that's based on reason and common sense. A fair, honest, and reasonable doubt.
>
> Now, a reasonable doubt is not a vain, fictitious, imaginary doubt. A hunch, a feeling, or a possibility of innocence. It's a doubt for which you can assign a reason for having.
>
> *If you can say that you have an abiding conviction to a moral certainty, then you have no reasonable doubt, and you should convict.*
>
> *If you do not have an abiding conviction to a moral certainty, then you should acquit the defendant.*
>
> Again, a reasonable doubt is a doubt that's based on reason and common sense. A fair, honest, and reasonable doubt. *Not a flimsy, imaginary, fictitious doubt. A feeling, a hunch, or a possibility of innocence. That's not a reasonable doubt.* [Emphases added.]

The jury instructions in this case, like the instructions in *Cage v Louisiana*, 498 US 39, 40-41; 111 S Ct 328, 112 L Ed 2d 339 (1990), overruled on other grounds by *Estelle v McGuire*, 502 US 62, 72 n 4; 112 S Ct 475; 116 L Ed 2d 385 (1991), contained language to the effect that a reasonable doubt is more than the possibility of innocence. However, as was the case in *Victor v Nebraska*, 511 US 1, 5-23; 114 S Ct 1239; 127 L Ed 2d 583 (1994), the jury instructions do not contain the additional language contained in *Cage*, *supra* at 40-41, that a reasonable doubt must "give rise to a grave uncertainty" and must be "an actual substantial doubt." Moreover, the "moral certainty" language in this case merely instructs the jury that if it has an abiding

conviction to a moral certainty, it should convict defendant and that if it does not have an abiding conviction to a moral certainty, it should acquit defendant. Thus, the "moral certainty" language in the case at hand does not suggest that the jury can only acquit the defendant if it has an actual substantial doubt to a moral certainty that the defendant did not commit the charged crimes. See *Cage, supra* at 40-41 Therefore, we conclude that the reasonable doubt instructions in the case at hand, like the reasonable doubt instructions in *Victor, supra* at 7, are distinguished from the reasonable doubt instructions in *Cage, supra* at 40-41, because it is reasonably likely that the jury in the case at hand would not have interpreted the instructions to indicate that the doubt needed to acquit must be anything other than a reasonable one. Accordingly, we conclude that the reasonable doubt instructions sufficiently protected defendant's rights and fairly represented to the jury the issues to be tried. *Victor, supra* at 5-23. Thus, any objection to the trial court's "beyond a reasonable doubt" instruction would have been futile. Accordingly, defendant was not deprived of the effective assistance of counsel. *Ackerman, supra* at 455.

We also reject defendant's argument that he was denied of his right to the effective assistance of counsel when defense counsel failed to object to the trial court's aiding and abetting instruction. To prove aiding and abetting of a crime, a prosecutor must show: (1) that the crime charged was committed by the defendant or some other person; (2) that the defendant performed acts or gave encouragement which assisted in the commission of the crime; and (3) that the defendant intended the commission of the crime or had knowledge of the other's intent at the time he gave the aid or encouragement. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). Here, in relevant part, the trial court's aiding and abetting instruction did not inform the jury that it could only find defendant guilty under an aider and abettor theory if it found that defendant intended the commission of the charged crimes or at least had knowledge that the individual he assisted intended the commission of the charged crimes. Therefore, the instruction was erroneous. *Id*. However, an overwhelming amount of evidence was presented that supports defendant's convictions as a principal offender. Therefore, defense counsel's failure to object to the erroneous instruction did not affect the outcome of the proceedings. Accordingly, defendant has not established a right to relief. *Toma, supra* at 302-303.

Finally, we also reject defendant's argument made in pro persona that he was denied his right to the effective assistance of counsel by defense counsel's failure to have the perpetrator testify. Defendant failed to support this argument by citation to the record or authority. Therefore, this argument was abandoned on appeal. *Watson, supra* at 587.

Affirmed, but remanded to the trial court for correction of the PSIR to reflect that defendant was convicted by a jury. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski